(15)

03-407

SUPREME COURT, U.S.
FILED
SEP 2 - 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JUDGE JOHN F. KOWALSKI, JUDGE WILLIAM A. CRANE, and JUDGE LYNDA L. HEATHSCOTT,

Petitioners,

JUDGE DENNIS C. KOLENDA,

Respondent,

—v.—

JOHN CLIFFORD TESMER, CHARLES CARTER, ALOIS SCHNELL, ARTHUR M. FITZGERALD, and MICHAEL D. VOGLER,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL BRIEF FOR RESPONDENTS

DAVID A. MORAN
Counsel of Record
WAYNE STATE UNIVERSITY LAW SCHOOL
471 West Palmer
Detroit, Michigan 48202
(313) 577-4829

MARK GRANZOTTO
414 West Fifth Street
Royal Oak, Michigan 48067
(248) 546-4649

Counsel for Respondents

(Counsel continued on inside front cover)

MICHAEL J. STEINBERG
KARY L. MOSS
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF MICHIGAN
60 West Hancock Street
Detroit, Michigan 48201
(313) 578-6814

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
125 Broad Street, 18th Floor
New York, New York 10004
(212) 549-2611

Counsel for Respondents

SUPPLEMENTAL ARGUMENT

Respondents file this Supplemental Brief in order to address the August 27, 2004, published decision of the United States Court of Appeals for the Sixth Circuit in *Abela v. Martin*, ___ F.3d ___, 2004 WL 1906171 (6th Cir. 2004).

Respondents have maintained throughout this litigation that an order of the Michigan Court of Appeals denying an application for leave to appeal "for lack of merit in the grounds presented" is, in fact, a decision on the merits of the appeal. *See* Respondents' Brief at 30-31 (citing three published and four unpublished decisions of the Michigan Court of Appeals each holding that an order denying an application for leave to appeal "for lack of merit in the grounds presented" is a conclusive determination of the merits of the issues raised in the application). Petitioners claim, however, that an order denying leave to appeal for lack of merit in the grounds presented is not a decision on the merits. *See* Petitioners' Brief at 39-46, Reply Brief at 15-18. In support of this proposition, Petitioners have cited, *inter alia*, the decision of the Sixth Circuit in *McKenzie v. Smith*, 326 F.3d 721, 726-727 (6th Cir. 2003). Reply Brief at 44-46. As Respondents have already demonstrated, *see* Respondents' Brief at 31, not one of the cases cited by Petitioners can fairly be read to hold or even state that an order denying an application for leave to appeal "for lack of merit in the grounds presented" is anything other than a decision on the merits. Indeed, the phrase "lack of merit in the grounds presented" never even appears in *McKenzie* or in any of the other cases cited by Petitioners.

In *Abela*, the Sixth Circuit directly and unambiguously confirmed that a Michigan Court of Appeals' order denying an application for leave to appeal for "lack of merit in the grounds presented" is a decision on the merits for habeas corpus purposes:

> In our case, the last reasoned state court judgment before the Michigan Supreme Court's order—which was the Michigan Court of Appeals' decision denying leave to appeal—*was a merits determination.* The Court of Appeals stated that the motion was "DENIED *for lack of merit in the grounds presented.*" Similarly, the trial court had previously denied the motion for post-conviction relief "for lack of merit on the grounds presented." In short, unlike in *Simpson* [*v. Jones*, 238 F.3d 399 (6th Cir. 2000)] and *Burroughs* [*v. Makowski*, 282 F.3d 410 (6th Cir. 2002)], the state courts below the supreme court never invoked a procedural bar here, but rather repeatedly *ruled on the merits*.

Abela, slip op. at 11-12 (emphasis added, citations omitted). *See also id.* at 12 ("all of the lower state courts adjudicated Abela's case on the merits"). This portion of *Abela* was unanimous. *See id.* at 26 (Siler, J., concurring in "all of the conclusions by the majority" except Fifth Amendment issue).

In short, the Sixth Circuit, the federal appeals court that regularly reviews habeas petitions from Michigan prisoners whose applications for leave to appeal to the Michigan Court of Appeals have been denied "for lack of merit in the grounds presented," squarely held in *Abela* that such orders are decisions on the merits.

CONCLUSION

For the reasons set forth in Respondents' Brief, the judgment of the United States Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

David A. Moran
Counsel of Record
Wayne State University Law School
471 W. Palmer
Detroit, Michigan 48202
(313) 577-4829

Mark Granzotto
414 West Fifth Street
Royal Oak, Michigan 48067
(248) 546-4649

Steven R. Shapiro
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, New York, 10004
(212) 549-2611

Counsel for Respondents

Date: August 30, 2004